(4) COPY

Supreme Court, U.S.
FILED

MAY 14 2001

OFFICE OF THE CLERK

No. 00-1322

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, California State Prison at San Quentin, *Petitioner,*

v.

BRUCE WAYNE MORRIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
SUSAN RANKIN BUNTING
Deputy Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5251
Fax: (916) 324-2960
Counsel for Petitioner

12 pp

TABLE OF CONTENTS

	Page
PETITIONER'S REPLY MEMORANDUM	1
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
Cases	
Blackledge v. Allison 431 U.S. 63 (1977)	i, 2, 5, 6
Caro v. Calderon 165 F.3d 1223 (9th Cir. 1998)	5
Chang v. United States __ F.3d __ (9th Cir. 2001)	6
Coleman v. Vasquez 771 F. Supp. 300 (N.D. Cal. 1991)	4
Correll v. Stewart 137 F.3d 1404 (9th Cir. 1998)	4
In re Blodgett 502 U.S. 236 (1992)	6
Keeney v. Tamayo-Reyes 504 U.S. 1 (1992)	i, 2, 4-6
McFarland v. Scott 512 U.S. 849 (1994)	3
Michael Williams v. Taylor 529 U.S. 420 (2000)	i, 2, 4-6
People v. Duvall 9 Cal. 4th 464 (Cal. 1995)	2

TABLE OF AUTHORITIES (continued)

	Page
Rich v. Calderon 170 F.3d 1236 (9th Cir. 1999)	5
Siripongs v. Calderon 35 F.3d 1308 (9th Cir. 1994)	5
Townsend v. Sain 372 U.S. 293 (1963)	6
Williams v. Calderon 52 F.3d 1465 (9th Cir.1994)	5

CAPITAL CASE
QUESTIONS PRESENTED

The District Court granted summary judgment and denied the capital prisoner's petition for writ of habeas corpus when the prisoner failed to provide any proof to either state or federal courts of any genuine issue of material fact. The prisoner had received approximately $100,000 in pre-petition investigation funds, but failed to show "good cause" for discovery. The Ninth Circuit remanded for an evidentiary hearing because the prisoner raised a "colorable claim" of ineffective assistance of counsel and incompetency.

The questions presented are:

1. Do the restrictions on factual development by a prisoner in federal habeas corpus proceedings in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) and *Michael Williams v. Taylor*, 529 U.S. 420 (2000) apply **only** when the state has conducted an actual evidentiary hearing on the prisoner's claims?

2. Notwithstanding *Blackledge v. Allison*, 431 U.S. 63, 80 (1977), which held that a district court may deny a habeas corpus petition by summary judgment, is a prisoner still entitled to an evidentiary hearing merely because he raised a "colorable" claim even though the District Court issued an undisturbed finding that the prisoner failed to produce any evidence in state or federal court of any genuine issues of material fact?

IN THE SUPREME COURT OF THE UNITED STATES

No. 00-1322

JEANNE WOODFORD, Warden, California State Prison at San Quentin, *Petitioner,*

v.

BRUCE WAYNE MORRIS, *Respondent.*

PETITIONER'S REPLY MEMORANDUM

In this capital habeas corpus case, the Ninth Circuit vacated the federal district court's denial on summary judgment of Respondent/Prisoner Morris's claims of ineffective assistance of counsel and incompetence and remanded the case for an evidentiary hearing. The Ninth Circuit remanded the case even though Morris had not sought an evidentiary hearing in the manner prescribed by California law and had not provided any affirmative evidence to the district court of any genuine issues of material fact. The Ninth Circuit rationalized this remand on the incorrect premise that Morris was entitled to an evidentiary hearing on his "colorable" claims because he had "not received an evidentiary hearing on these claims at any level." (App. 9.) The opinion did not discuss Morris's insufficient response to the summary judgment motion.

This case raises two distinct issues about a habeas applicant's entitlement to an evidentiary hearing. The petition establishes that the Ninth Circuit's remand violated this Court's

prior decisions in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) and *Williams v. Taylor*, 529 U.S. 420 (2000) since Morris did not seek an evidentiary hearing in state court by including "copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or supporting declarations" as required by California law. *People v. Duvall*, 9 Cal. 4th 464, 474-479; 37 Cal. Rptr. 259; 886 P.2d 1252 (Cal. 1995). (Petn. at 8.) Equally significant, the petition demonstrates that the court properly granted the state's summary judgment motion pursuant to this Court's decision in *Blackledge v. Allison*, 431 U.S. 63 (1977) since Morris did not present any affirmative evidence of any genuine issues of material fact. (Petn. at 11.)

At the outset, due to the Ninth Circuit's cursory opinion, it is significant that both parties agree that Morris's state and federal petitions contained only allegations, no supporting evidence. Morris voices no disagreement with the petition on the following facts: **(1)** that he filed a state habeas petition with no supporting copies of reasonably available documentary evidence supporting his claims, including affidavits or supporting declarations as prescribed by California law (App. 228-293), **(2)** that the California Supreme Court denied his petition on both the merits and on separate procedural grounds (App. 294), **(3)** that his discovery motion in federal court was not supported by evidence of good cause (App. 295-312), **(4)** that his opposition to summary judgment was not supported by any affirmative evidence of a genuine issue of material fact (Opp. at 8.) (App. 313-383), **(5)** that the district court denied his claims on both substantive and procedural grounds when it granted the summary judgment motion (Petn. at. 4-6; App. 100 n.12, 103, 204 n.49, 208, 210 & n.50), **(6)** that he withheld "detailed and complex documents and information" which he allegedly obtained in support of his claims (App. 385) and **(7)** that the Ninth Circuit's remand conflicts with this Court and other circuits on multiple grounds pertaining to summary judgment. (Petn. at 14-15.)

Morris's opposition irrelevantly and incorrectly complains that he was denied the opportunity to factually develop his claims because of restricted funding and the California Supreme Court's procedural denial of his state habeas corpus petition. (Opp. at 6-9.) Morris disagrees with the petition's assertion that he received approximately $100,000 to investigate his case prior to filing his state and federal petitions. He does not deny receiving the money, but only disputes its purpose. (Opp. at 6.)

The district court responsible for dispensing the money explicitly and thoroughly rejected this "obfuscatory and specious" argument (App. 42):

> Although this court discouraged full funding of expert investigation fees at the time, counsel were given $93, 725.00 in attorneys' fees for purposes of investigation and preparation of the initial petition along with $1,202.92 in expense reimbursement during the time period from appointment to order of exhaustion (7/30/92-12/19/93).

(App. 42.) Morris had a year and a half to investigate his case and received approximately $100,000.00 *before* he even filed an initial mixed petition. Contrary to Morris's statement, the only thing the district court "discouraged" was "full funding" for "expert investigation." However, the "vast majority" of Morris's claims involved no expert testimony. There was no limitation on investigation funds to "state a claim," including unexhausted claims. Morris did not request further monies. (App. 42, 60.) Morris has never shown that the district court did not discharge its duty to authorize "reasonably necessary" services to research and identify possible claims and their factual bases. *McFarland v. Scott*, 512 U.S. 849, 855 (1994). Morris had every opportunity to develop his claims and failed to do so.

Morris's receipt of approximately $100,000 from the courts before he even presented his claims to the California Supreme Court exposes the soft underbelly of capital habeas corpus practice by giving this Court an opportunity to review a

case in light of information that is frequently undisclosed–the nature and extent of pre-petition financing, investigation and development of federal claims in capital cases. Ordinarily, this system should serve to sort out and narrow claims. *See, e.g. Coleman v. Vasquez,* 771 F. Supp. 300, 302 (N.D. Cal. 1991) (prisoner will either decide that a claim exists or abandon a claim that is not tenable). In Morris's case, it repeatedly revealed that there was no evidentiary support for his allegations of ineffective assistance of counsel and incompetency. The Ninth Circuit completely disregarded this inexcusable evidentiary void when it blithely remanded Morris's case.

Morris believes it significant that the California Supreme Court denied his petition on procedural grounds that were ultimately not deemed to be independent and adequate state grounds by the Ninth Circuit. (Opp. at 7; App. 7-8.) However, procedural default is completely irrelevant to the questions presented in this petition regarding Morris's entitlement to an evidentiary hearing in district court. Morris had already received "approximately $100,000.00" prior to his state habeas petition. The California Supreme Court alternatively denied Morris's petition on the merits. He patently failed to state a prima facie case because he did not seek an evidentiary hearing as prescribed by state rules. The procedural default, of course, is completely unconnected to Morris's independent failure to produce affirmative evidence in opposition to summary judgment.

Both parties agree that *Williams v. Taylor* is significant. However, Morris makes the same mistake the Ninth Circuit made. He believes his negligence in developing the record in state court is somehow excused because he did not receive an evidentiary hearing "at any level." (App. 9.) Neither *Keeney* nor *Williams* contains such an illogical holding.[1/] This

---

1. In other cases, the Ninth Circuit has also rejected this argument, but this is just part of the disarray within the circuit about evidentiary hearings which it chose not the rectify in this case. *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir. 1998)

Court held that Williams did not exercise diligence under *Keeney* when he failed to present readily available evidence to the state court. The state's failure to hold an evidentiary hearing was irrelevant to the diligence inquiry. *Williams*, 529 U.S. at 437. To the extent that the underdevelopment of claims is attributable to the prisoner, "[w]e do not suggest that the State has an obligation to pay for investigation of as yet undeveloped claims . . ." *Id.* at 443.

The underdevelopment of the claims in Morris's case was directly attributable to Morris. Morris received nearly $100,000 to develop his claims. Morris and the Ninth Circuit both overlook that the California Supreme Court and the district court denied his claims on the merits. The California Supreme Court denied his petition because he did not make a prima facie case due to his undisputed failure to support his allegations. The procedural default was an irrelevant separate ground for the state court's denial of the petition. The vacuity of Morris's allegations was conclusively confirmed by his separate failure to provide affirmative evidence of a genuine issue of disputed fact in opposition to summary judgment in the district court. *Blackledge*, 431 U.S. at 80-81.

Evidentiary hearings are an important component of habeas review. However, as the Second Circuit Court of Appeals just pointed out on the very day that Morris filed his opposition in this Court, they are also a source of "delay, the

---

(*Keeney* rule applies even if state court did not conduct evidentiary hearing); *compare Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994); cited in *Morris v. Woodford* (App. 9) with *Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir.1994) (if a "colorable claim" has been made out, evidentiary hearing is only "generally likely"); *see also Rich v. Calderon*, 170 F.3d 1236, 1239 (9th Cir. 1999) (no evidentiary hearing when petitioner failed to present evidence "in support of claims that colorably entitled them to relief" despite five months to investigate and prepare); and *Caro v. Calderon*, 165 F.3d 1223, 1228 & n.1 (9th Cir. 1998) (Kleinfeld, J. dis.).

needless expenditure of judicial resources, [a] burden on trial counsel and the government, and perhaps [of]encouragement of other prisoners to make similar baseless claims that would have resulted from a full testimonial hearing." *Chang v. United States*, __ F.3d __ (9th Cir. 2001) (2001 WL 473725)(f. May 4, 2001). The *Keeney-Williams* rule of diligence through "meaningful exhaustion" and the procedure for summary judgment should have operated either separately or in tandem to give effect to this Court's and Congress' "intent to avoid unneeded evidentiary hearings in federal habeas corpus. . . ." *Williams*, 529 U.S. at 436; *Blackledge*, 431 U.S. at 80. Both this Court and Congress have distinguished between "prisoners who exercise diligence in pursuing those claims [from] those who do not." *Williams*, at 436. In this case, the Ninth Circuit drew no distinction. If it had done so, it would have affirmed the district court.

Morris's minimization of the questions presented as "unremarkable" is ultimately self-defeating. (Opp. at 2.) Morris received substantial investigative funding, did not seek an evidentiary hearing as prescribed by state law, offered no support to show "good cause" for discovery, and presented no affirmative evidence of a genuine issue of material fact. He does not dispute that the disposition conflicts with other circuits. The casualness of the remand reflects dysfunction in the system for the prompt, efficient, and sensitive resolution of capital habeas corpus petitions. *In re Blodgett*, 502 U.S. 236, 240 (1992). Either this system works or it does not. Morris's trivialization of this case as routine or mundane actually underscores that the Ninth Circuit has also so far departed from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's supervisory power. *Townsend v. Sain*, 372 U.S. 293, 325 (1963)(Goldberg, J. conc.)

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 11, 2001

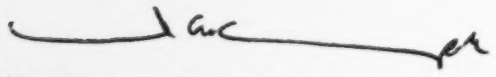
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

DAVID P. DRULINER
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

SUSAN RANKIN BUNTING
Deputy Attorney General



WARD A. CAMPBELL
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner